



VIA ELECTRONIC MAIL AND US MAIL

November 29, 2007

Mr. Philip Isenberg, Chairman
Delta Vision Blue Ribbon Task Force
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

Re: Modesto Irrigation District Comments on Delta Vision Draft No. 3

Dear Mr. Chairman and Task Force Members:

On behalf of the Modesto Irrigation District, we submit the following comments on the third draft of the Task Force document "*Our Vision for California's Delta*" ("*Vision Document*"). The opportunity to comment is greatly appreciated.

The District is an independent, publicly owned utility located in California's Central Valley. Established in 1887, it is the second oldest irrigation district in California. In cooperation with the Turlock Irrigation District, it operates New Don Pedro Dam and Reservoir, which operates on, and obtains water from, the Tuolumne River. New Don Pedro Reservoir is the sixth largest freshwater multi-user reservoir in California and the largest non-federal reservoir in the Central Valley. The District provides electric service and irrigation and drinking water to the greater Modesto area (north of the Tuolumne River, Waterford, Salida, Mountain House (Northwest of Tracy) and parts of Ripon, Escalon, Oakdale and Riverbank.

The *Vision Document* properly recognizes the critical need for new storage and conveyance systems in order to reduce the impacts associated with conveying water through the Delta and relying on the state and federal pumping facilities for necessary water supplies. The *Vision Document*, however, must properly recognize the fundamental foundations of California water law if it is going to provide an effective foundation for future of California.

The *Vision Document* repeatedly refers to "reasonable use and public trust principles of the California constitution." This is an incorrect reading of the Constitution. Article X, Section 2 prohibits waste, unreasonable use, and unreasonable method of use. It further provides that "the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Nowhere does the Constitution refer to the public trust doctrine. The *Vision Document*, in referring to Constitutional principles, should instead refer to "reasonable and beneficial use" or prohibitions of "waste, unreasonable use, and unreasonable method of use."

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This is not to say that the public trust doctrine is absent from California water law. The public trust doctrine functions as part of an integrated system of water law, preserving continuing sovereign power of the state to protect public trust uses and precluding anyone from acquiring a vested right to harm the public trust. (National Audubon Soc’y v. Superior Court (1983) 33 Cal.3d 419, 452, cert. denied, 464 U.S. 977.) The public trust doctrine has traditionally been used to determine whether an existing use is consistent with the public trust. (City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 521 [court decided grant of tideland for construction of marina incompatible with public trust doctrine].) If the use is compatible with the public trust, there is no problem. If the use is not compatible, such use may be curtailed, amended or even eliminated. (National Audubon Soc’y, *supra* 33 Cal.3d 419 at 448.) The water user’s need for water, reliance on supply, and the cost and environmental impact of obtaining water elsewhere are all factors that must enter into *every* allocation decision. (*Id.*) The public trust doctrine is fact and individual specific depending on the particular use of water by a particular person. It is not a policy tool for broad water supply allocation and re-allocation decisions.

Even then, public policy, as established in the law, does not elevate public trust beneficial uses, such as fish and wildlife, above other beneficial uses. (St. Water Resources Control Bd. Cases (2006) 136 Cal.App.4th 674, 778.)¹ In establishing water quality objectives, even flow-based water quality objectives, the state, acting through the State Water Resources Control Board (“SWRCB”), has a duty to consider and protect *all* beneficial uses of water, including municipal, industrial, and agricultural uses. (Water Code §13241.) Although the SWRCB must protect public trust uses whenever feasible, it must do so in a manner consistent with the public interest and by balancing *all* competing interests. (St. Water Resources Control Bd. Cases, *supra* 136 Cal.App.4th at 778.) The law does not require the SWRCB weigh any particular use more heavily than another. (*Id.* [The court was “not persuaded” that the SWRCB was obligated under the public trust doctrine to implement more generous flow objectives even if it would have been feasible to do so].)

The Third Principle of the *Vision Document* recommends that the state seek “equitable access to higher quality water sources,” but does not explain what it means by “equitable access.” (*Vision Document*, p7 line 38.) The Task Force needs to be honest and up front with the public. If the *Vision Document* is recommending condemnation proceedings and use of eminent domain in order to reallocate supply to other uses, it should clearly say so. Use of such power by the state would be unprecedented, as the Constitutional principles of reasonable and beneficial use are limited to determining whether a use is reasonable and beneficial, not whether one use is more reasonable or more beneficial than another. (Town of Antioch v. Williams Irr. Dist., 188 Cal. 451 (sought flows to prevent saltwater intrusion); Peabody v. City of Vallejo, 2 Cal. 2d. 351

¹ The Task Force has included a summary of United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, also known as the “*Racanelli*” decision, among its materials. Although *Racanelli* remains relevant, it should be viewed as complimenting the more recently decided State Water Resources Control Board Cases, also known as the “*Robie*” decision, which today stands as the last word in Bay-Delta water law and should not be ignored.

(flows to flood land and to provide incidental recharge); People ex rel. St. Water Resources Control Bd. v. Forni, 54 Cal.App.3d 743 (sought water for frost protection); Imperial Irr. Dist. v. St. Water Resources Control Bd. (1990) 225 Cal.App.3d 548 (examined irrigation and delivery practices which resulted in dumping of tailwater and drainage into the Salton Sea); Erickson v. Queen Valley Ranch Co. (1971) 22 Cal. App.3d 578 (determined method of diversion which resulted in loss of five-sixths of water during transport).) Furthermore, whether a use, and the method thereof, is reasonable is a question of fact that must be resolved in every instance. (Forni, *supra* 54 Cal.App.3d at 750.) If, in a specific instance, a use is deemed unreasonable and is not deemed a beneficial use, the state does not reallocate the water, but instead curtails or eliminates the use and once again makes the water available for appropriation. Given its significant infrastructure investments and its customers' reliance on its services, the District is extremely alarmed by the potential misuse of the state's power of eminent domain and condemnation.

The Seventh Principle of the *Vision Document*, which provides that a "revitalized Delta ecosystem may require reduced diversions, or changes in patterns of diversion upstream, within, and exported from the Delta," also falls short, because it must specify that diversions of junior water right holder would be the diversions reduced or altered. Under the laws of appropriation of water in California, if there is insufficient water in a stream system to support all appropriators, then diversions diminish starting with the most junior appropriators. (Pleasant Valley Canal Company v. Borror (1998) 61 Cal.App.4th 742, 770). Even a "physical solution" under Article X, Section 2 cannot ignore or change the priority system and neither can it eliminate vested rights. (City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224, 1250.) Many water rights in the Delta include conditions such as Term 91, which prohibits water diversion when the United States Bureau of Reclamation or the Department of Water Resources is releasing stored or foreign water from the Central Valley Project or the State Water Project to satisfy in-basin entitlements, such as water quality objectives in the Sacramento-San Joaquin Delta. (SWRCB, *In the Matter of Administrative Civil Liability Complaints for Violations of Licenses 13444 and 13274 of Lloyd L. Phelps, Jr.; License 13194 of Joey P. Ratto, Jr.; License 13315 of Ronald D. Conn and Ron Silva, Et Al.*, Order WR 2004-0004, *2 (available in 2004 WL 367585 (Feb. 19, 2004).) The purpose of Term 91 is to ensure that water released by the Central Valley Project or the State Water Project to meet water quality objectives is not diverted by other water right holders, but instead remains in the watershed and contributes to meeting those objectives. (*Id.*) It is the policy of the state that the SWRCB shall take vigorous action to enforce water right conditions. (Water Code §1825.) Consequently, the SWRCB should enforce conditions such as Term 91 and curtail illegal diversion and use of water before it begins curtailing the diversion and use of water right holders who are not subject to such conditions.

Other water rights in the Delta, particularly riparian water rights and pre-1914 water rights, have never been comprehensively defined and, as a result, are almost entirely unregulated. (SWRCB, *In the matter of applications 5625, 2526, 9363, 9364, 9365, 9366, 9367, 9368, 10588 of USBR to appropriate water from Sacramento River, Rock Slough, Old River, and Channels of the Sacramento-San Joaquin Delta*, Water

Right Decision 990, *35 (available in WL 1961 WL 6816 (Feb. 9, 1961).)² In 2004, the SWRCB issue complaints for administrative civil liability against Delta water right licensees who were allegedly diverting water in violation of Term 91. (SWRCB WRO 2004-0004.)³ The licensees protested on the basis that, even if there were prohibited from diverting and using water under their licenses, they could nonetheless divert and use water pursuant to riparian or pre-1914 water rights. (*Id.* at 3-4.) After collecting evidence and holding hearings wherein witnesses were under oath and subject to cross-examination, the SWRCB concluded that two of the licensees lacked supplemental water rights and had diverted and used water illegally. (*Id.* at 22.)⁴ If the licensees who illegally diverted and used water in the Term 91 hearing are at all typically of Delta water use, then tens of thousands of acre-feet of water could be illegally used and diverted every year. The Water Rights Division has followed up on direction from the SWRCB in the 2006 *Water Quality Control Plan for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary* by examining the irrigation salinity requirements in the South Delta with current science, beginning to comprehensively quantify the diversion and use of water in the South Delta, and by surveying and quantifying quality of return flows. This work should continue.

Finally, the *Vision Document* has also deleted the importance of native species and the need to reduce or eliminate non-native species for the benefit and protection of the native species from the Ecosystem Restoration Vision. The third draft of the *Vision Document* does not make the same statements. Rather, it contains little snippets such as “the Delta must also contain thriving terrestrial habitats and sport and commercial fisheries that have been important to the northern California’s culture and economy for decades.” (*Vision Document*, p. 15.) Given the focus on “sport” and “commercial” fishing economy, it is clear that striped bass and other “valuable” non-natives are to be maintained, despite their impact to the native species.

Thank you for your consideration of these comments and for your service on the Task Force. The District looks forward to your work in developing the Strategic Plan and will remain engaged in the process.

Very truly yours,
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By:



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² Water Right Decision 990 is also available on the Internet from the SWRCB at <http://www.waterrights.ca.gov/hearings/decisions/WRD990.PDF>.

³ Order WR 2004-0004 is also available on the Internet from the SWRCB at <http://www.waterrights.ca.gov/hearings/WaterRightOrders/wro2004-0004.pdf>.

⁴ After a mandamus challenge, WRO 2004-0004 was affirmed by the Third District Court of Appeal (Case No. C052770). The court’s opinion has recently been certified for publication.